PHANG CHIN HOCK v. PUBLIC PROSECUTOR (No. 2)

[F.C. (Raja Azlan Shah Ag. L.P., Chang Min Tat & Ibrahim Manan F.JJ.) September 19, 1979]

[Kuala Lumpur — Federal Court Criminal Appeal No. 27 of 1977]

Criminal Law and Procedure — Whether appeal lies to Yang di-Pertuan Agong — Courts of Judicature (Amendment) Act, 1976.

Constitutional Law — Appeals to Yang di-Pertuan Agong — Whether consent of Conference of Rulers necessary for abolition of right of appeal — Courts of Judicature (Amendment) Act, 1976 — Federal Constitution, arts. 38(4), 131 & 159(5).

In this case the appellant applied by motion for leave to appeal to the Yang di-Pertuan Agong against the judgment of the Federal Court,* dismissing his appeal against conviction for an offence under section 57(1)(b) of the Internal Security Act. It was argued that section 13 of the Courts of Judicature (Amendment) Act, 1976, which abolished appeals in criminal cases to the Yang di-Pertuan Agong was invalid because the Conference of Rulers had not given its consent under Article 38(4) of the Federal Constitution.

Held: (1) appeals to the Yang di-Pertuan Agong come within the item of "civil and criminal procedure and administration of justice" which is in the Federal List and therefore the Yang di-Pertuan Agong may on the advice of the Cabinet abolish any or all such appeals;

(2) the appeal in this case was not pending at the date of the coming into force of the Courts of Judicature (Amendment) Act, 1976 and therefore the motion must be dismissed.

Cases referred to:-

(1) *Colonial Sugar Refinery Company Ltd.* v. *Irving* [1905] A.C. 369.

(2) *Lee Chow Meng* v. *Public Prosecutor* [1978] 2 M.L.J. 36.

FEDERAL COURT.

G.T.S. Sidhu (*Jagjit Singh* with him) for the appellant.

T.S. Sambanthamurthi (Deputy Public Prosecutor) for the respondent.

Raja Azlan Shah Ag. L.P. (delivering oral judgment of the Court): This is a motion by the appellant for leave to appeal to His Majesty the Yang di-Pertuan Agong against a judgment of this court given on June 28, 1979.

The appellant was charged for an offence under section 57(1)(b) of the Internal Security Act No. 82 (Revised 1972) for possession of six rounds of ammunition and was tried under the Essential (Security Cases) Regulations, 1975 before the High Court in Kuala Lumpur. He was convicted and sentenced to death on April 4, 1977. He lodged notice of appeal to this court on April 9, 1977. On January 1, 1978 the Courts of Judicature (Amendment) Act, 1976 (Act A328) which has the effect of abolishing the right of appeal in criminal matters to the Yang di-Pertuan Agong came into force. On June 28, 1979 this court dismissed his appeal against conviction.

We hope we can be forgiven for disposing this case in a few words with the submission of counsel for the appellant. We do so because, quite frankly, we have been unable to understand it. The submission rests, we gather, on the argument that section 13 of the Act A328 is invalid because the Conference of Rulers has not given its consent under Article 38 Clause (4) of the Constitution, it being said, that such right which we concede is a substantive right cannot be taken away from the Rulers without their express consent: (see Article 159 Clause (5) of the Constitution of Malaysia). The said article reads: "No law directly affecting the privileges, position, honours or dignities of the Rulers shall be passed without the consent of the Conference of Rulers." We can see no foundation for that argument.

The Conference of Rulers is a constitutional body established under Article 38 of the Constitution with certain executive deliberative and consultative functions.

The executive functions are those of (a) electing and removing the Yang di-Pertuan Agong and his Deputy, (b) in the matter of religion, agreeing or disagreeing to the extension of any religious acts, observances or ceremonies to the Federation as a whole and (c) consenting or withholding consent to any law such as a law which affects the privileges, position, honours or dignities under clause (4) or a law which alters the boundaries of a state and making or giving advice on any appointment which requires the consent of the Conference e.g. the Public Services Commission, the Railway Service Commission and the Education Service Commission under Articles 139(4), 141(2) and 141A(2) respectively and on any designated appointment of a head or deputy head of a department under Article 144(3) and (5).

Insofar as these executive functions are concerned, the Rulers act in their discretion.

The consultative functions of the Conference in clause (5) is limited to administrative action under Article 153 i.e. to matters affecting the special position. in West Malaysia, of the Malays.

But in their deliberative functions, the Rulers may range over any field since clause (2) refers to questions of national policy and any other matter the Conference thinks fit. When they come to these functions, the practice has developed, they sit on the second day of the Conference and they are then attended by the Yang di-Pertuan Agong who shall be accompanied by the Prime Minister. In their deliberations, the clause specifically provides that not only the Rulers and the Yang di-Pertua-Yang di-Pertua Negeri but also the Yang di-Pertuan Agong shall act in accordance with the advice of the respective Executive Councils and Cabinet respectively. Necessarily in these matters, the Rulers make no decisions.

A contention that a decision to abolish appeals to the Yang di-Pertuan Agong affects the privileges, position, honours or dignities of the Rulers must therefore be examined in the context of Article 38 and the Federal List. A federation implies basically the surrender of certain of the powers of hitherto absolutely sovereign Constitutional members. Item 4 of the Ninth Schedule, which is the Federal List and in this part consists of legislative matters makes "civil and criminal law and procedure and administration of justice" a federal matter. The decision to abolish appeals to the Yang di-Pertuan Agong comes within the matters which the Rulers may deliberate upon, subject to the

* See *supra*, p. 70.

condition that their deliberations are in accordance with the advice of their Executive Councils and in the company of the Yang di-Pertua-Yang di-Pertua Negeri and the Yang di-Pertuan Agong. But the Rulers take no decision in the matter. Article 131 specifically enables the Yang di-Pertuan Agong to make arrangements with Her Majesty the Queen of England for the reference of appeals to him to the Privy Council "in any case in which such an appeal is allowed by federal law." He may decide, as he did in this case, on the advice of his Cabinet, to abolish any or all appeals to himself. In all his functions, the Yang di-Pertuan Agong is not a Ruler within the meaning of a Ruler of a constitutional state of the Federation. When a Ruler becomes the Yang di-Pertuan Agong, he cannot hold at the same time his position of a Ruler but he is required to appoint a Regent. At the Conference of Rulers, the Regent attends as a Ruler, but the Yang di-Pertuan Agong is not entitled to attend as a Ruler and for this reason, he does not attend on the first day when the Rulers exercise the functions set out which lie within their discretion. Law and procedure therefore are matters which cannot come within the honours, etc. of the Rulers.

The case before us has been loaded with so much learning and marked by brilliance of exposition of all the constitutional points involved, that we do stand in danger of not seeing the wood for the trees, and if we get entangled in the branches of the trees, we may miss reaching the destination: the correct conclusion or decision which is whether Act A328 affects pending appeals. The Privy Council case in *Colonial Sugar Refinery Company Ltd.* v. *Irving*[1] which is cited to us has held that if the amending Act affects substantive rights, it will not apply to pending proceedings already commenced unless a clear intention to that effect is manifested. We have looked at subsection (4) of section 13 of Act A328. It reads: "The amendments embodied in this section shall not apply to any appeal or application for appeal which is pending at the date of the coming into force of this section." That subsection has been judicially interpreted in the Privy Council case in *Lee Chow Meng* v. *Public Prosecutor*[2] as follows: "The subsection makes it perfectly clear that the amendment in question, which deletes the right of appeal in criminal matters, applies to all cases except those in which an appeal or an application for appeal is pending at the date of coming into force, namely January 1, 1978." We cannot possibly cavil at the decision of the Privy Council in *Lee Chow Meng*, supra, or wish to criticize it. It is apparent that Act A328 does not affect pending appeals and the singular point before us is whether an appeal to the Privy Council is pending as on January 1, 1978. In our view pending appeal must undoubtedly mean an appeal properly brought within the meaning of the Judicial Committee Rules, 1957, in particular, rules 3 and 4. We are satisfied that as on that date no appeal was pending before the Privy Council. We would therefore dismiss the motion.

Motion dismissed.

Solicitors: *Jagjit Singh & Co.*

PUBLIC BANK BHD. v. PERBADANAN KEMAJUAN NEGERI SELANGOR

[F.C. (Raja Azlan Shah Ag. L.P., Chang Min Tat & Syed Othman F.JJ.) September 24 & October 18, 1979]

[Kuala Lumpur — Federal Court Civil Appeal No. 133 of 1976]

Contract — Building Contract — Guarantee — Security deposit in form of Security guarantee by Bank — Liability of surety — Whether claim maintainable when liability of principal not ascertained — Contracts Act, 1950, s. 79.

This was an appeal from the decision of Mohamed Azmi J. ([1980] 1 M.L.J. 172). The respondent had claimed payment of the security deposit which had been given in the form of a security guarantee by the appellant bank, to secure the due performance of a building contract. The contractor had defaulted in performing the building contract. The principal argument at the appeal was that the security guarantee was inoperative until the full extent of the liability of the principal debtor had been ascertained.

Held: on a proper construction of the security guarantee, the appellant had promised to pay the security deposit which the contractor was required to pay as a condition precedent in the event of his default to perform the contract. When the contract was determined in accordance with its terms due to the default of the contractor, the security deposit required became payable.

FEDERAL COURT.

V.K. Palasuntharam (*Philip Choong Mun Chong* with him) for the appellants.

Mohamed Ismail bin Shariff for the respondents.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): This appeal calls for the proper construction of a document executed by the appellant Bank on its own form in favour of the respondent. The document is in these words:

"Public Bank Berhad
Kuala Lumpur

12th October, 1972.

To: Perbadanan Kemajuan Negeri Selangor, Petaling Jaya.

Sir,

SECURITY GUARANTEE

As requested by the Contractor Beton Construction Co. Ltd., No. 8, Leboh Ampang, Kuala Lumpur, we hereby guarantee that the sum of $135,666 (Dollars One hundred thirty-five thousand six hundred and sixty-six only) being the amount of Security Deposit required for the due performance of the convenants of their contract with you re: construction of piled foundation and sub-structure of sub-basement and basement for 12 storey office cum Shopping Centre at Jalan Raja Laut Tambahan, Kuala Lumpur shall become payable by us in the event of the Contractor's failure to perform the said convenants.

This guarantee is effective from October 15, 1972 to January 15, 1974 or further to the actual completion date of the contract for which this guarantee is submitted if duly notified by your authorised representative and confirmed by us in writing countersigned by the Contractor and is conditional upon a claim thereunder being made by the original or any revised expiry date, as is duly notified by your authorised representative.

Yours faithfully,
for PUBLIC BANK BERHAD
Kuala Lumpur

Sgd. ? Manager Sgd. ? Accountant."

The appellant would stress the description of the document as a guarantee.

The allied question is the default of the contractor. The relevant terms of the building contract between